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No. 384

# Supreme Court of the United States

OCTOBER TERM, 1953

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CECELIA S. LARSON AND RUSSELL T. THOMPSON,
*Appellants,*

*v.*

CITY OF LONG BEACH, a municipal corporation,
*Appellee.*

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*ON APPEAL FROM THE APPELLATE DEPARTMENT OF THE SUPERIOR COURT, COUNTY OF LOS ANGELES, STATE OF CALIFORNIA*

---

## PETITION OF APPELLANTS FOR REHEARING.

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KENNETH SPERRY,
CHARLES A. HORSKY,
AMY RUTH MAHIN,
ADRIAN S. FISHER,
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*Of Counsel:*
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# INDEX


Page

Argument ..... 1
Appendix A ..... i


## CITATIONS

**Cases:**


*Atlantic Coast Line* v. *Phillips*, 332 U.S. 168 ..... 8
*Dodge* v. *Board of Education*, 302 U.S. 74 ..... 8
*Francis* v. *Southern Pacific Co.*, 333 U.S. 445 ..... 9
*Hale* v. *Iowa State Board of Assessment and Review*, 302 U.S. 95 ..... 8
*Huddleston* v. *Dwyer*, 322 U.S. 232 ..... 9
*Kern* v. *City of Long Beach*, 29 Cal. 2d 848, 179 P. 2d 799 (1947) ..... 3, 4
*Packer* v. *Board of Retirement*, 35 Cal. 2d 212, 217 P. 2d 660 (1950) ..... 4
*Panos* v. *Great Western Packing Co.*, 21 Cal. 2d 636, 134 P. 2d 242 (1943) ..... 7
*State Farm Mutual Auto Ins. Co.* v. *Duel*, 324 U.S. 154, 160-63 9
*Terry* v. *City of Berkeley*, 41 A.C. 715,—P. 2d — (1953) ..... 2, 3, 4, 6, 8, 9
*Union Pacific Co. of California* v. *Reconstruction Oil Co.*, 20 Cal. App. 2d 170, 66 P. 2d 1215 (1937); 58 Cal. App. 2d 30, 135 P. 2d 621 (1943) ..... 7


**Constitutional Provisions:**


Article I, Section 10, Constitution ..... 7
Due Process Clause, Fourteenth Amendment, Constitution ... 8


**Miscellaneous:**


*Judicial Code*, 28 U.S.C., Sec. 2106 ..... 9
*Cyc. of Fed. Proc.* (3rd ed.) Vol. 14, p. 614 ..... 7

# Supreme Court of the United States

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*ON APPEAL FROM THE APPELLATE DEPARTMENT OF THE SUPERIOR COURT, COUNTY OF LOS ANGELES, STATE OF CALIFORNIA*

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## PETITION OF APPELLANTS FOR REHEARING.

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*To the Honorable Earl Warren, Chief Justice, and the Honorable Associate Justices of the Supreme Court:*

Cecelia S. Larson and Russell T. Thompson, appellants herein, respectfully pray that a petition for rehearing be granted in the above entitled cause after its order dismissing said appeal "for want of a substantial federal question", made and entered herein on November 30, 1953, and in support thereof show the following:

1) That subsequent to the submission of appellee's motion to affirm or dismiss herein, the highest court of the state from which said appeal was taken, to wit, the California Supreme Court, by its decision made and

entered in connection with the case of *Terry* v. *City of Berkeley*, filed November 25, 1953, published December 1, 1953, 41 A.C. 715, —— P. 2d ——, has so clarified the law of California as to make it clearly apparent that the decisions of the Appellate Department of the Superior Court from which the instant appeals were taken, as well as the contentions urged by appellee in support of its motion to dismiss, are based upon an erroneous interpretation of the California law which gives rise to the federal questions herein presented, and that a reversal of said decisions is necessary in order to prevent a serious miscarriage of justice. This decision did not come to the attention of counsel until too late to call it to the attention of this Court prior to its order granting appellee's motion to dismiss in this case on November 30, 1953. A copy is attached as Appendix A.

2) The issue presented in the case at bar is whether the appellee, the City of Long Beach, could constitutionally modify to appellants' detriment, the provisions of a statute which provided for the payment of specified retirement, disability and death benefits after the happening of the contingencies which made such benefits payable. More specifically, the question presented is whether the pensions which appellants were receiving as the widow of a deceased policeman and as a retired fireman, respectively, could be "frozen" at a fixed sum by an amendment to the city charter, when the statute in force at the time the appellant Larson's husband was killed and the appellant Thompson retired for length of service, provided for the payment of a fluctuating pension, i.e., 50% of whatever amount is currently being paid to one holding the rank or position formerly held by the policeman or fireman at the

time of death or retirement. It was conceded by appellee that acceptance of employment and the performance of services by the employee in reliance upon the offer embodied in the statute created a contract between the city and its employees. However, the court below, relying upon certain ambiguous language as used by the California Supreme Court in the case of *Kern* v. *City of Long Beach*, 29 Cal. 2d 848, 179 P. 2d 799 (1947), determined that the obligation on the part of the city was merely to pay a reasonable and substantial pension which was subject to reasonable modification after, as well as before, the happening of the contingency which matured the pension, viz.:

> "* * * we have no hesitation in concluding that the defendant city possessed the right to make a change in the provisions of its charter concerning the rate of pay to a pensioner so long as it left him a substantial and reasonable pension, and that the amendment, which has the effect today of returning less to the plaintiff than the former provision did, but tomorrow may return more, gives the plaintiff a substantial and reasonable pension." (Jurisdictional Statement, p. 47.)

In the *Kern* case, and the others alluded to in the opinion, the California courts were concerned solely with the constitutionality of an attempted repeal or modification of a pension system as it applied to the rights of employees who were not then eligible for retirement. An examination of the decision in the *Terry* case will reveal that the constitutional problems therein presented were identical to those presented in the case at bar. There, as here, the court was called upon to determine the constitutionality of an amendment to an

existing pension system which attempted to alter the monthly benefits payable to a municipal employee after the happening of the contingency (there a service-connected injury) which matured his pension. There, as here, the statute in force at the time of his retirement as construed by the court entitled the retired employee to receive monthly payments throughout the remainder of his life measured by the salary currently attached to the position formerly held by the employee for a certain period of time preceding his retirement. There, as here, the statute under consideration purported to modify this formula and to provide for the payment of a fixed pension, namely, 50% of the average salary received by the employee for a period of three years preceding his retirement. There, as here, the defendant city contended that the contract right of the employee was merely to receive a reasonable and substantial pension which was subject to modification after, as well as before retirement, relying upon the same ambiguous language which was quoted by appellee in its motion to dismiss or affirm herein from the former decision of the California Supreme Court in the cases of *Kern* v. *City of Long Beach*, 29 Cal. 2d 848, 179 P. 2d 799 (1947), and *Packer* v. *Board of Retirement*, 35 Cal. 2d 212, 217 P. 2d 660 (1950). In disposing of this contention, the California Supreme Court in the *Terry* case at p. 719 of its opinion said:

> "In support of the asserted retroactive effect of Section 24.1 the defendants contend that although the right to a pension is a vested right as an integral part of the contract of employment still it is a right to a fair pension only the terms of which may be altered within reason without an impairment of the contract. They rely in the main upon

Kern v. City of Long Beach, 29 Cal. 2d 848. But in that case and in the other cases referred to (Packer v. Board of Retirement, 35 Cal. 2d 212; Sweesy v. L. A. Etc. Retirement Board, 17 Cal. 2d 356; Brophy v. Employees Retirement System, 71 Cal. App. 2d 455; McCarthy v. Oakland, 60 Cal. App. 2d 547; Brooks v. The Pension Board, 30 Cal. App. 2d 119) the court did not have before it the question of the obligation due a pensioner after his status had become fixed by the happening of the contingency which made the pension due and payable. *The cited cases are authority for the proposition that reasonable changes detrimental to the pensioner may be made in pension provisions for public employees or their beneficiaries before the happening of the contingency.* (In this connection see, Home v. Souden, 199 Cal. 508, concerning changes beneficial to the pensioner made after the happening of the contingency.) *In the present case the plaintiff had been retired; he had rendered the called-for performance; he had done everything possible to entitle him to the payment of his pension and all conditions precedent to the obligation of the city were fulfilled upon the determination that he be retired as a result of his service-connected disability. The pension payments are in effect deferred compensation to which the pensioner becomes entitled upon the fulfillment of the terms of the contract and which may not be changed to his detriment by subsequent amendment.* (Robertson v. Miller, 276 U. S. 174; Kern v. City of Long Beach, supra, 29 Cal. 2d 848; Kavanagh v. Board of Police P. F. Commrs., 134 Cal. 50; Vero v. Sacramento City E. R. System, 41 Cal. App. 2d 482; 20 Cal. Jur. 998.)" (Emphasis ours.)

Accordingly the court affirmed a judgment of the Superior Court whereir the plaintiff employee was permitted to recover the difference between the amounts previously paid him as a pension pursuant to the amended statute, and the fluctuating benefits provided for by the statute in force at the time of the happening of the contingency which matured his pension.

3) The foregoing language is precisely applicable in the present case since both appellants had, like Terry, "been retired", "rendered the called for performance", "had done everything possible to entitle" them "to the payment of" their "pension", and "all conditions precedent to the obligation of the city were fulfilled". It is crystal clear, therefore, that the court below has in fact misconstrued the opinions of the Supreme Court of California. In the *Terry* case the amount due the pensioner at the time suit was filed exceeded $3,000.00; hence, it was possible to file suit in the Superior Court from which an appeal could be perfected to the California Supreme Court, whereas the amounts due at the time suits were filed in the cases at bar were such that appellants were compelled to sue in the municipal court of the Long Beach Judicial District, from which exclusive jurisdiction on appeal was vested in the Appellate Department of the Superior Court. As pointed out in the jurisdictional statement at pages 16 and 17, no procedure is available under state practice to review the decisions of that court by any higher court in the state, and appellants were compelled to seek relief in the Supreme Court of the United States to protect their contractual rights to receive the pension payments in question as against impairment by the state statute which the municipal court held was unconstitutional, but which the Appellate Department of the Superior Court held was valid.

4) In the case at bar we therefore have the situation wherein this Court has been prevailed upon to dismiss an appeal from the decision of an intermediate court of California, which is clearly in conflict with the highest court of the same state upon a substantial Federal question, namely, whether the contract right of a municipal employee to receive specific monthly benefits measured by the salary currently attached to the rank formerly held by him, may be altered to his detriment after the happening of the contingency which entitled him to receive the lifetime pension. While it must be confessed that the relative importance of the question thus presented from the standpoint of the public at large is somewhat lessened by the fact that the California Supreme Court has now clarified the law of that state on the question here presented, the apparent injustice of the decisions appealed from is correspondingly increased insofar as the respective rights of the instant appellants are concerned. In other words, if the decisions of the Appellate Department of the Superior Court are permitted to stand, which follows automatically from the granting of appellee's motion to dismiss (Cyc. of Fed. Proc., 3rd ed., Vol. 14, p. 614), said decisions, even if erroneous, will establish the law of the case insofar as these appellants are concerned (*Union Oil Co. of California* v. *Reconstruction Oil Co.*, 20 Cal. App. 2d 170 66 P. 2d 1215 (1937); 58 Cal. App. 2d. 30, 135 P. 2d 621 (1943); *Panos* v. *Great Western Packing Co.*, 21 Cal. 2d 636, 134 P. 2d 242 (1943)), and by virtue of the principles of res adjudicata, their contract rights as construed by the highest court of the state, will be impaired with respect to all payments which have or will become due them following June 5, 1951, and throughout the remainder of their lives, contrary to the purpose and effect of Article I, Section 10,

and the due-process clause of the Fourteenth Amendment to the Federal Constitution.

5) Analytically, a determination of whether a particular state action impairs the obligation of contract involves a determination of whether a) a contract, in fact, existed and b) the action complained of impairs its obligation. The question of whether a contract exists is a question of state law and although a state court determination does not bind this Court it will be accepted unless manifestly wrong. See *Dodge* v. *Board of Education*, 302 U.S. 74; *Hale* v. *Iowa State Board of Assessment and Review*, 302 U.S. 95; *Atlantic Coast Line* v. *Phillips*, 332 U.S. 168. This Court stated its view in the case of *Dodge* v. *Board of Education* in the following the language (302 U.S. at 79):

> "While we are required to reach an independent judgment as to the existence and nature of the alleged contract, we give great weight to the views of the highest court of the State touching these matters."

In the statement filed by the City of Long Beach opposing jurisdiction and moving to dismiss or affirm, Counsel for the City of Long Beach relied heavily upon the argument that under the law of the State of California the appellants did not have the contractual rights which were claimed, and therefore no impairment of the obligation of contract existed. See Statement Opposing Jurisdiction and Motion to Dismiss or Affirm, pp. 7-15.

The decision of the Supreme Court of California in *Terry* v. *City of Berkeley* held, as to an identical pension system, a contract right did exist under California law identical with that claimed by the appellant in this

proceeding. This decision is an intervening event of great importance to this Court.

It establishes that the appellants do have the contract rights which they claim. With these contract rights established the validity of the provisions of the charter of the City of Long Beach which impair them is clearly a substantial Federal question, even though it would not have been if the existence of these contract rights had not been established.

The procedure normally followed by this Court is described in *State Farm Mutual Auto Ins. Co.* v. *Duel*, 324 U.S. 154, 160-63. This customary procedure is for this Court to vacate the judgment of the state court where there has been a supervening event since its rendition by the State Court which alters the basis upon which the judgment rests and to remand the case to the state court so that the court might reconsider the question in light of the changed circumstances. See *Huddleston* v. *Dwyer*, 322 U.S. 232; *Francis* v. *Southern Pacific Co.*, 333 U.S. 445.

It is submitted that the interests of justice require similar action in this case.

WHEREFORE, appellants respectfully pray:

A. That this court grant a petition for rehearing and note probable jurisdiction.

B. In the alternative, and to prevent a clear miscarriage of justice, that it revoke its former order, take jurisdiction of the case, and reverse or set aside the decisions of the Appellate Department of the Superior Court herein appealed from, and remand the cause to that court with instructions to take such further proceedings as may be appropriate in the light of the decision in *Terry* v. *City of Berkeley*. (Title 28, U.S.

Code Sec. 2106.) In this way the Court, without itself becoming involved in the controversy, can prevent the judgment below from becoming final and can afford the opportunity to the court below to take whatever corrective action it believes appropriate in the light of the subsequent decision of the California Supreme Court.

C. For such other or different relief as may be appropriate.

Respectfully submitted,

KENNETH SPERRY,
CHARLES A. HORSKY,
AMY RUTH MAHIN,
ADRIAN S. FISHER,
*Counsel for Appellants*

*Of Counsel:*

COVINGTON & BURLING

December 15, 1953.

We certify that this petition is presented in good faith and not for delay.

AMY RUTH MAHIN
ADRIAN S. FISHER

December, 1953

## APPENDIX A

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA
IN BANK

S. F. 18585

ERNEST TERRY, *Plaintiff and Respondent,*

*vs.*

CITY OF BERKELEY, ET AL., *Defendants and Appellants.*

This is an appeal from a judgment for the plaintiff in an action by a retired police officer for declaratory relief and for an accumulated amount alleged to be due him from a pension fund pursuant to an ordinance of the defendant city of Berkeley.

The plaintiff was a member of the Police Department of the city of Berkeley from August, 1925, to May 1, 1940, when he was retired because of physical disability incurred in the line of duty. At the time of his retirement and for more than three years immediately prior thereto he held the rank of "Mounted Patrolman" and received the salary attached to that rank of $185.00 per month. At that time Berkeley Ordinance No. 2250-N.S. provided that under the conditions applicable to the plaintiff's retirement a pension would be paid during the period of his disability. Section 13 of the ordinance fixed the amount of the pension in the following language: ". . . he shall be paid from the Fund during the period of his disability a pension equal to one-half of the average salary attached to the rank or ranks held during the three years immediately preceding the date of retiremnt . . . ." Accordingly, the plaintiff's pension was determined to be $92.50 a month at the time of his retirement, and payments of that amount were made to him. Shortly after his retirement the salary attached to the rank of mounted patrolman was increased and additional periodic increases later became effective. Finally, in February, 1951, subsequent to the commencement of this action, the salary was increased to $334.80 per month. The amounts received by the plaintiff have remained at $92.50 a month. He asserts that he is and has been entitled to one-half of the fluctuating salary attached to the rank he held rather than to one-half the monthly amount paid to him during the three years immediately prior to his retirement. The trial court

agreed with the interpretation of Section 13 asserted by the plaintiff and awarded to him the sum of $3,095.74, the difference between $92.50 and one-half of the salary attached to the rank of mounted patrolman for the years within the period of the statute of limitations and the elapsed time since the filing of the complaint. In addition the court awarded in his favor the declaratory relief sought by the plaintiff as to future payments.

The question involves the construction of Section 13 prior to its amendment as hereinafter indicated. More precisely the question is the proper application of the term "salary" as used in that section. The plaintiff contends that at any particular time it is the salary then attached to the rank held for the three years immediately prior to retirement. The defendants contend that it is a fixed amount, the equivalent of the salary actually earned during the three year period.

The plaintiff's basic contention is that the three year period defines only the rank held and not the salary earned. It finds support in the language of the ordinance itself which refers to the "average salary" as that "attached to the rank or ranks held during the three years." The plaintiff argues that had the framers of the ordinance intended that the pension be fixed by the average salary earned during the three year period they would have so indicated by describing the "average salary" as that which "was attached to the rank or ranks held during the three years", rather than by using the phrase "the average salary attached" which indicates a presently existing salary. He contends that the framers were aware of such a distinction as evidenced by the language they employed in Section 10 to establish a pension ascertainable by reference to a fixed salary independent of salary fluctuations within ranks. That section provides: "Upon the death of any person receiving a pension . . . a pension equal to one-third of the average salary upon which said pension . . . was based" shall be awarded to certain survivors.

The plaintiff relies upon Casserly v. City of Oakland, (1936) 6 Cal. 2d 64, wherein a provision of the charter of the City of Oakland provided that a pension should be "equal to one half of the salary attached to the rank held" at the date of retirement. The court held that this provision provided for a fluctuating pension, which increased or decreased as the salaries paid to active employees increased or

decreased. The language employed in the present case differs from that in the Casserly case only in the addition and substitution of the underlined words in the following quotation of the charter provision in the latter case: "equal to one-half of the *average* salary attached to the rank *or ranks* held *during the three years immediately preceding the date of* retirement." The plaintiff contends that the additional language merely changes the method of determining the "rank" on which pension payments are to be based. While the particular rank in the Casserly case was determined by reference to the rank held at retirement, in the present case it is determined by reference to the rank or ranks held for three years prior to retirement. As the salary of the rank in the Casserly case fluctuated the pensioner's benefits were also held to fluctuate. As the average salary of the rank or ranks held in the present case fluctuates, the plaintiff argues that his benefits should also fluctuate unless the Casserly case is to be disregarded. The court there held at page 66: "the salary attached to the rank at the time the payments fall due, and not the salary at the time the pension was awarded, measures its amount."

In Klench v. Board of Pension Fund Commrs., (1926) 79 Cal. App. 171, a statute provided that a retired police officer was entitled "during his lifetime to a yearly pension equal to one-half of the amount of salary attached to the rank he may have held on such police force on the date of such retirement." The following language from that case is quoted in the Casserly case at pages 66-67: ". . . it is our belief that the word 'salary' . . . was intended to refer to the rank of the retired police officer and not to the time at which he was retired. In other words, the section as phrased seems clearly enough to indicate that what the legislature intended thereby to declare was that, on being retired under said act, a member of the police department should be paid a pension based upon the salary which may be paid to police officers of the *rank held by him at the time of the retirement* of such officer." (To the same effect, see Whitehead v. Davie, 189 Cal. 715; Jones v. Cooney, 82 Cal. App. 265; Aitken v. Roche, 48 Cal. App. 753, 755; Rumetsch v. Davie, 47 Cal. App. 512, 514.)

The defendants contend that the Casserly and other similar cases are not applicable to the facts of the present case because of the difference in the language employed.

But they fail to point out a material variation pertinent to the issue here under consideration. True, the provisions of the ordinance might be susceptible to more than one interpretation. But ambiguity and uncertainty in this type of legislation requires, under accepted rules, a construction which will, if reasonably possible, accomplish the objects and purposes of the legislation. "It is a general and well recognized rule that pension provisions shall be liberally construed in favor of the applicant." (Gibson v. City of San Diego, 25 Cal. 2d 930, 935; See also Lyons v. Hoover, 41 A.C. 147; McKeag v. Board of Pension Commrs., 21 Cal. 2d 386, 390.)

To accomplish the result sought by the defendants required an amendment to Section 13. This was brought about in 1944, more than four years after the plaintiff retired. The pertinent portions of the section as amended provide for "a pension equal to one-half of the average monthly rate of salary which such member shall have received during the three years immediately preceding the date of retirement . . . ." Also in 1944 Section 24.1 was added to the ordinance in an endeavor to make Section 13 as amended retroactive. The new section provided that "any person now receiving a pension under the terms of this ordinance shall receive an amount based upon the average monthly rate of salary which such member received during the three years immediately preceding the date of retirement, and that said amount shall be a fixed amount that shall not increase nor decrease, regardless of any change in salary subsequent to the date of the granting of the original pension . . . ."

In support of the asserted retroactive effect of Section 24.1 the defendants contend that although the right to a pension is a vested right as an integral part of the contract of employment still it is a right to a fair pension only the terms of which may be altered within reason without an impairment of the contract. They rely in the main upon Kern v. City of Long Beach, 29 Cal. 2d 848. But in that case and in the other cases referred to (Packer v. Board of Retirement, 35 Cal. 2d 212; Sweesy v. L.A. Etc. Retirement Board, 17 Cal. 2d 356; Brophy v. Employees Retirement System, 71 Cal. App. 2d 455; McCarthy v. Oakland, 60 Cal. App. 2d 547; Brooks v. The Pension Board, 30 Cal. App. 2d 119) the court did not have before it the question of the

obligation due a pensioner after his status had become fixed by the happening of the contingency which made the pension due and payable. The cited cases are authority for the proposition that reasonable changes detrimental to the pensioner may be made in pension provisions for public employees or their beneficiaries before the happening of the contingency. (In this connection see, Home v. Souden, 199 Cal. 508, concerning changes beneficial to the pensioner made after the happening of the contingency.) In the present case the plaintiff had been retired; he had rendered the called-for performance; he had done everything possible to entitle him to the payment of his pension and all conditions precedent to the obligation of the city were fulfilled upon the determination that he be retired as a result of his service-connected disability. The pension payments are in effect deferred compensation to which the pensioner becomes entitled upon the fulfillment of the terms of the contract and which may not be changed to his detriment by subsequent amendment. (Robertson v. Miller, 276 U.S. 174; Kern v. City of Long Beach, supra, 29 Cal. 2d 848; Kavanagh v. Board of Police P.F. Commrs., 134 Cal. 50; Vero v. Sacramento City E.R. System, 41 Cal. App. 2d 482; 20 Cal. Jur. 998.)

Accordingly it is concluded that the provisions of Section 13 in effect when the Plaintiff retired were in all material respects the same as the language of the charter provisions of the City of Oakland involved in the Casserly case, insofar as those provisions relate to the present inquiry; and that the amended section did not affect the plaintiff's retirement benefits.

The judgment is affirmed.

SHENK, J.

We concur:

CARTER, J.
TRAYNOR, J.
SCHAUER, J.
SPENCE, J.

We concur in the judgment:

GIBSON, C. J.
EDMONDS, J.

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CECILIA S. LARSON and RUSSELL T. THOMPSON,

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vs.

CITY OF LONG BEACH, a municipal corporation,

*Appellee.*

## APPELLEE'S ANSWER TO PETITION OF APPELLANTS FOR REHEARING.

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## TABLE OF AUTHORITIES CITED

CASES

PAGE

Home v. Souden, 199 Cal. 508..... 5

Terry v. City of Berkeley, 41 A. C. 715.....2, 3, 6, 7

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CITY OF LONG BEACH, a municipal corporation,

*Appellee.*

## APPELLEE'S ANSWER TO PETITION OF APPELLANTS FOR REHEARING.

*To the Honorable Earl Warren, Chief Justice, and the Honorable Associate Justices of the Supreme Court:*

The appellants are requesting that this Honorable Court set aside its order granting appellee's motion to affirm or dismiss on the following grounds:

> "1) That subsequent to the submission of appellee's motion to affirm or dismiss herein, the highest court of the state from which said appeal was taken, to wit, the California Supreme Court, . . . has so clarified the law of California as to make it clearly apparent that the decisions of the Appellate Department of the Superior Court . . . are based upon an erroneous interpretation of California law which gives rise to the federal questions herein presented, . . ."

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"2) . . . whether the appellee, the City of Long Beach, could constitutionally modify to appellants' detriment, the provisions of a statute which provided for the payment of specified retirement, disability and death benefits after the happening of the contingencies which made such benefits payable."

In answer to the first question, the appellee submits that the appellants did not take said appeals from the Supreme Court of California, but from the Appellate Department of the Superior Court of the State of California, in and for the County of Los Angeles. The appellee submits that the decisions of the Appellate Department of the Superior Court are not in conflict with the decision of the Supreme Court of the State of California in the case of *Terry v. City of Berkeley,* 41 A. C. 715, a copy of which decision is attached to petition of appellants for rehearing.

The Supreme Court of the State of California, in the *Terry* case, stated that the City could not modify the pension rights of the plaintiff therein *to the detriment of the plaintiff.* In the above cited case, the evidence established that the salary fixed for the rank of "Mounted Patrolman" was and had been for more than three years prior to 1940 the sum of $185.00 per month, and that by February of 1951, the salary had been increased to $334.80 per month. The Supreme Court stated that the pension payments *"may not be changed to his detriment by subsequent amendment."* (Italics ours.) Thus, the City of Berkeley attempted to fix the pension of the plaintiff at a time when salaries had remained stable for a number of

years. When economic cycles are taken into consideration, it would be unreasonable to assume that salaries would drop below the 1937 to 1940 level, and if salaries did not drop below the 1937 to 1940 level, the plaintiffs therein would suffer a detriment. It was on this basis, therefore, that the Supreme Court of California determined that the amendment adopted by the City of Berkeley was void. *However, it is to be noted that the Supreme Court of California did not declare all amendments to pension statutes after retirement void.* Such a declaration would prevent a governmental body from increasing pension benefits in event pensions were low and did not meet the requirements of elderly pensioners. It was only those which were detrimental to the pensioner which were declared void. Furthermore, at the time of the preparation of this answer, the judgment in the *Terry* case had not become final. The appellee has been informed that a petition for rehearing was filed, but has not been informed as to the disposition thereof.

One of the questions involved in these appeals, is whether the amendment to the Charter of the City of Long Beach is in fact detrimental to the appellants. If the amendment is not in fact detrimental, then the law of California is clear that the amendment is not unconstitutional. The facts in the case at issue are clearly distinguishable from the facts in the case of *Terry v. City of Berkeley, supra.* As appellee has heretofore pointed out, the City of Berkeley attempted to fix pensions based on the salaries paid between 1937 and 1940, and that by

February of 1951, the salary fixed for the rank of "Mounted Patrolmen" had increased from $185.00 to $334.80. In the case at issue, the appellee did not attempt to fix pensions based on the 1937 to 1940 salary schedules but on the 1951 salary schedules. This court can take judicial notice of the fact that wages and salaries have increased substantially within the eleven years preceding June of 1951. As a matter of fact, the City of Long Beach, like all employers of labor, was required to make substantial raises in salaries. The amendment to the Charter of the City of Long Beach froze pension payments at a relative high level. It is true that salary raises have been granted since June of 1951. The appellee submits that this court cannot determine as a matter of fact that salaries will not drop below the 1951 level. If salaries drop below the 1951 level, the appellants will have received a benefit, and therefore, it cannot be said that the amendment will operate to the detriment of the appellants. In fact the Appellate Department of the Superior Court of the State of California recognized this fact when it stated:

> ". . . and that the amendment, which has the effect today of returning less to the plaintiff than the former provision did, but tomorrow may return more, gives the plaintiff a substantial and reasonable pension."

The appellee submits that in order to hold the charter amendment involved unconstitutional, the court must reach the conclusion that salaries will not drop below the 1951 level. If salaries drop below the 1951 level, then the

appellants will receive a higher pension in the future but receive less at the present time.

The history of this country has been one of rises and falls in its economy. Wages and prices have not remained steady for any appreciable period of time. During recent years prices and wages have risen, but there can be no certainty that wages and prices will not again recede, and whether they will remain above or drop below the 1951 level is a matter of pure speculation. If the wages drop below the 1951 level, then the appellants will receive benefits rather than have suffered a detriment. Only the passage of time can answer this question. Therefore, unless a governmental body is precluded from making any amendments to its pension statutes, it cannot be said that the 1951 amendment to the Charter of the City of Long Beach is unconstitutional for the reason that it amends the pension statutes to the detriment of the pensioners. In fact, the Supreme Court of the State of California, in the *Terry* case, cited the case of *Home v. Souden,* 199 Cal. 508, in support of the proposition that beneficial amendments may be made to pension statutes.

On page 6 of their petition, the appellants argue that it is crystal clear that the decision of the Appellate Department of the Superior Court misconstrued the opinion of the Supreme Court of California in the *Kern* case. It is true that some of the language in the decision of the Appellate Department of the Superior Court is inconsistent with the language of the Supreme Court of California in the *Terry* case. However, the Appellate

Department of the Superior Court in its decision recognized the fact that *the amendment may have the effect of returning less today and more tomorrow, and therefore, implies that the amendment is not necessarily detrimental to the pensioner.*

On page 7 of their petition, appellants argue that this court has been prevailed upon to dismiss the appeals from a decision of an intermediate court of California which is clearly in conflict with the decision of the highest court of said state. The appellee submits that it has established that the decisions filed in these appeals are not in conflict with the decision of the Supreme Court of California in the *Terry* case. If the amendment is not in fact detrimental to the interest of appellants, then appellants will not be prejudiced by this court denying the petition for rehearing.

On page 8 of their petition, the appellants contended that "Counsel for the City of Long Beach relied heavily upon the argument that under the law of the State of California the appellants did not have the contractual rights which were claimed, and therefore no impairment of the obligation of contract existed." The appellee at all times conceded that the appellants had vested contractual rights of which they could not be deprived. However, the appellee contended that the rights could be modified. The Supreme Court of the State of California has apparently recognized that pension statutes may be modified so long as the amendment is beneficial and not detrimental to the rights of the pensioners. *The appellee*

*submits that it has not been established that the questioned amendment is in fact detrimental to the appellants, and therefore, no federal question has been presented to this court.*

The appellants are requesting this court to remand the actions to the state court so that said court might reconsider the question in light of the changed circumstances. The only question for the state court to consider, unless the decision of the Supreme Court of the State of California in the case of *Terry v. City of Berkeley, supra,* is set aside, is whether the amendment is in fact detrimental. The appellee submits that this question has already been considered by the state court when it stated that the amendment may pay less today but more tomorrow. To decide otherwise would be to speculate as to future economic trends.

WHEREFORE, appellee respectfully prays that the petition of appellants for rehearing be denied.

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CLIFFORD E. HAYES,
*Deputy City Attorney,*
*Counsel for Appellee.*